

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**A.S., Appellant**

**and**

**U.S. POSTAL SERVICE, CAMILLA POST  
OFFICE, Camilla, GA, Employer**

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**Docket No. 19-1432  
Issued: August 5, 2020**

*Appearances:*

*Andrew Douglas, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Deputy Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 21, 2019 appellant, through counsel, filed a timely appeal from a May 17, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the May 17, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether appellant has met her burden of proof to establish entitlement to intermittent wage-loss compensation commencing December 23, 2017, causally related to her accepted August 29, 2017 employment injury.

## **FACTUAL HISTORY**

On August 29, 2017 appellant, then a 49-year-old carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day she injured her lower back when she tripped on a floor mat and fell while in the performance of duty. On the back of the form the employing establishment noted that appellant had not stopped work.<sup>4</sup> OWCP accepted the claim for lower back muscle, fascia, and tendon strain.

On December 5, 2017 appellant was seen by Dr. Michael Pare, a Board-certified neurosurgeon, who noted appellant's complaints of back pain, provided examination findings, and diagnosed dorsalgia. Dr. Pare reported that appellant was currently working a sedentary position for two hours per day and continued to have a fair amount of back pain complaints. He attributed appellant's failure to improve in part to fibromyalgia and recommended continued restricted duty.

A January 16, 2018 note from Kirk Clinic, Family Practice, which was signed by Jade Merritt,<sup>5</sup> noted that appellant was a patient at the clinic and requested that she be excused from work on January 11, 12, 13, 16, 18, 19, and 20, 2018.

On January 21, 2018 appellant filed claims for intermittent wage-loss compensation (Form CA-7) including for the period December 23, 2017 to January 19, 2018.<sup>6</sup>

In a development letter dated February 1, 2018, OWCP advised appellant that it had not received any evidence to support her claim for wage-loss compensation for the period January 6, through 19, 2018. It advised appellant regarding the medical evidence necessary to establish disability. OWCP afforded him 30 days to submit the necessary evidence.

In a January 23, 2018 note, Sean Saul, a physician assistant, noted that he had been involved with appellant's care under the management of Dr. Christopher N. Bazal, a Board-certified family medicine physician. Mr. Saul noted that appellant continued to have days of debilitating back pain which greatly limited her activity and resulted in her inability to work.

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<sup>4</sup> The employing establishment noted that appellant worked from 9:55 a.m. to 4:45 p.m., as directed. On September 29, 2017 appellant accepted a September 15, 2017 modified rural associate carrier associate job offer effective September 23, 2017 with work hours of 12:00 p.m. to 4:20 p.m.

<sup>5</sup> The Board notes that there is no other identifying information about the author.

<sup>6</sup> In attached time analysis forms (Form CA-7a) appellant claimed 23.20 hours of leave without pay (LWOP) for December 23, 26, 28, 29, and 30, 2017 and January 2, 4, and 5, 2018 (2.20 hours per day) and 23.20 hours of LWOP for January 6, 8, 9, 11 to 13, 15, 16, 18, and 19, 2018 (2.20 hours per day) due to excessive pain from her back injury. Appellant also claimed 23.20 hours for this period, including 2.20 hours of LWOP for Christmas Day (holiday) and 2.20 hours of LWOP for New Year's Day (holiday). The reason given for the leave on this form was "work injury with medical attached."

In a January 31, 2018 note from the Kirk Clinic, Jade Merritt, indicated that appellant was a patient at the clinic and requested that she be excused from work on January 20, 22, 23, 25, 26, 27, 29, 30, February 1, and 2, 2018 due to back injury pain.

In a February 21, 2018 report, Dr. Bazal noted that since appellant's work injury she continued to experience daily severe mid-back pain which was incapacitating. He reported that prior to her fall at work appellant was capable of fulfilling her employment duties without limitation, even with her fibromyalgia, but that she could no longer perform her work duties.

OWCP received disability notes from the Kirk Clinic, which were signed by Jade Merritt, requesting that appellant be excused from work due to work-related disability for numerous dates for the period January 20 through March 2, 2018.

In a development letter dated April 9, 2018, OWCP informed appellant that the evidence of record was insufficient to establish her claims for compensation for the periods December 23, 2017 to January 5, 2018. It advised her regarding the definition of the term disability under FECA and the medical evidence required to establish her claims. OWCP afforded appellant 30 days to provide the necessary evidence.

By decision dated April 9, 2018, OWCP denied appellant's claim for intermittent wage-loss compensation for the period January 6 through 19, 2018.

In an April 12, 2018 report, Dr. Bazal clarified the work excuses provided by his office. He opined that the dates appellant missed work were due to her complaints and that she had not been seen or evaluated on all the dates listed. Dr. Bazal attributed her work absences to her back injury.

In a report dated May 1, 2018, Dr. Mark A. Wolgin, a Board-certified orthopedic surgeon, noted that appellant's onset of back pain began with an August 29, 2017 employment injury when she tripped on a thick mat and fell and that she had been off work since December 21, 2017. He summarized her medical history noting a history of fibromyalgia since 2010 and noted that her current symptoms included constant low back pain radiating into her lower extremities. Appellant's physical examination findings were detailed. Dr. Wolgin diagnosed lumbar facet arthropathy, chronic bilateral shoulder pain, chronic low back pain with bilateral sciatica, and some degenerative changes. He opined that a component of her pain was likely due to her fibromyalgia and unrelated to her fall.

Dr. Wolgin, in a May 1, 2018 work/school note, provided work restrictions which included no frequent lifting, twisting, or bending, and no lifting more than five pounds. He explained that, if work was not available within these restrictions, appellant should remain off work.

In a May 17, 2018 report, Dr. Konstantin S. Tsymbalov, a Board-certified physiatrist, noted appellant's history of injury and medical treatment. He reported that appellant had been seen for lumbar pain complaints. Dr. Tsymbalov reviewed diagnostic testing and performed a physical examination. Examination findings included mild antalgic gait on the right, straight leg rising seated and rising positive for bilateral radicular pain, moderate lumbar paraspinal muscle tenderness and spasm and mildly to moderate decrease lumbar range of motion. Dr. Tsymbalov diagnosed chronic bilateral low back pain with bilateral sciatica.

On June 5, 2018 appellant was seen by Dr. Wolgin who noted that appellant was receiving pain treatment from Dr. Tsymbalov. Dr. Wolgin reported that appellant's examination findings were unchanged. He diagnosed chronic bilateral low back pain with bilateral sciatica due to a fall, chronic bilateral shoulder pain, and neck and thoracic pain. Dr. Wolgin opined that appellant's preexisting fibromyalgia had been aggravated by the accepted August 29, 2017 trip and fall. In support of this conclusion, he explained that appellant's back had been aggravated and she developed bilateral shoulder, neck, and intrascapular pain following the trip and fall. Moreover, Dr. Wolgin noted that appellant had no problem performing her duties and had no symptoms prior to the accepted August 29, 2017 employment injury. He concluded that appellant had been and continued to be totally disabled due to the accepted August 29, 2017 employment injury.

In work excuses dated June 5 and 7, 2018, Dr. Wolgin found appellant disabled from work until further notice.

Dr. Tsymbalov, in a June 12, 2018 report, diagnosed chronic bilateral low back pain with bilateral sciatica, lumbosacral radiculopathy, chronic pain syndrome subsequent to a fall, and myofascial pain syndrome. He noted that appellant's examination findings and review of diagnostic testing were unchanged. Dr. Tsymbalov opined that it was likely that appellant's lumbar pain was due to lumbar spondylosis with radiculopathy.

On June 21 and 25, July 26 and 27, August 23, and September 10, 2018, OWCP received Form CA-7 claims and accompanying Form CA-7a's for the period December 23, 2017 to August 31, 2018.<sup>7</sup>

In a June 28, 2018 development letter, OWCP informed appellant that the evidence of record was insufficient to establish her claim for compensation for the periods December 23, 2017 and continuing. It advised her regarding the definition of the term disability under FECA and the medical evidence required to establish her claim. OWCP afforded appellant 30 days to provide the information requested.

A July 5, 2018 report from Dr. Wolgin diagnosed chronic bilateral low back pain with bilateral sciatica and facet arthropathy. Dr. Wolgin reiterated that prior to her fall on August 29, 2017 appellant had no symptoms or difficulty performing her work duties. Thus, he concluded that she sustained an aggravation of her preexisting lumbar degenerative condition.

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<sup>7</sup> On the Form CA-7a, appellant claimed 23.20 hours of LWOP for January 20, 22, 23, 25 to 27, 29, 30, February 1, and 2, 2018 (2.20 hours per day), 23.20 hours for February 3, 5, 6, 8 to 10, 12, 13, 15, and 16, 2018 (2.209 hours per day), 23.20 hours for February 17, 19 (federal holiday), 20, 22 to 24, 25, 27, March 1, and 2, 2018 (2.20 hours per day), 23.20 hours for March 3, 5, 6, 8 to 10, 12, 13, 15, and 16, 2018, 23.20 hours for March 17, 19, 20, 22 to 24, 26, 27, 29 and 30, 2018, 23.20 hours for March 31, April 1, 3, 5 to 7, 9, 10, 12, and 13, 2018 (2.20 hours per day), 23.20 hours of LWOP for April 14, 16, 17, 19 to 21, 23, 24, 26, and 27, 2018 (2.20 hours per day), 7.00 hours of LWOP for April 28, 30, and May 1, 2018, 23.40 hours for May 14, 16, 18, 21, 23 and 25, 2018 (3.90 hours per day), 23.40 hours of LWOP for May 28, 30, June 1, 4, 6, and 8, 2018 (3.90 hours per day), 23.40 hours of LWOP for June 11, 13, 15, 18, 20, and 22, 2018 (3.90 hours per day) due to work injury with medical attached. (RD 1/25, 6/21, 25/2018) and 23.40 hours of LWOP for June 25, 27, 29, July 2, 4, and 6, 2018 (3.90 hours per day), 23.40 hours of LWOP for July 9, 11, 13, 16, 18, and 20, 2018 (3.90 hours per day), 23.40 hours of LWOP for July 23, 25, 27, 30, August 1, and 3, 2018 (3.90 hours per day), 23.40 hours of LWOP for August 6, 8, 10, 13, 15, and 17, 2018, 23.40 hours of LWOP for August 20, 22, 24, 27, 29, and 31, 2018 (3.90 hours per day) (3.90 hours per day) noting she was placed off work by her physician until further notice

In a July 10, 2018 report, Dr. Tsymbalov reported that appellant was seen for low back pain with unchanged examination findings. He diagnosed chronic bilateral low back pain with bilateral sciatica, lumbosacral radiculopathy, chronic pain syndrome, neuropathy, and lumbar facet arthropathy. The work restrictions provided by Dr. Wolgin were unchanged.

Dr. Tsymbalov's August 13, 2018 report noted diagnoses of myofascial pain syndrome, chronic bilateral low back pain with bilateral sciatica, chronic pain syndrome, and neuropathy. He attributed appellant's lumbar radicular pain as likely due to lumbar spondylosis with radiculopathy and myofascial in etiology. Dr. Tsymbalov noted her work restrictions were established by Dr. Wolgin.

By decision dated September 20, 2018, OWCP affirmed the denial of appellant's claim for intermittent wage-loss compensation on and after December 23, 2017.

OWCP continued to receive progress reports from Dr. Wolgin dated September 6 and November 1, 2018.

Dr. Wolgin, in a November 26, 2018 report, noted appellant's history of injury and medical treatment. He noted that appellant's physical examination revealed moderate lumbosacral spine tenderness with positive facet loading maneuvers and light touch skin tenderness, cervical spine moderate tenderness with light touch skin tenderness, positive bilateral shoulder Neer and Hawkins maneuvers, and negative straight leg reaching. Dr. Wolgin diagnosed chronic bilateral low back pain with bilateral sciatica, lumbosacral radiculopathy, bilateral shoulder joint pain, anxiety, lumbar facet arthropathy, chronic pain syndrome, and chronic neck pain with exacerbation from fall. Regarding causation, he opined that the fall at work exacerbated her lumbar radiculopathy and cervical and lumbar intervertebral disc disorder. In support of this opinion, Dr. Wolgin explained that where there was preexisting lumbar degeneration any pressure, such as a fall, on the spine worsened the lumbar condition. Pressure on the lumbar spine from the fall increased the load on the discs and resulted in further disc protrusion. If the protrusion was far enough, there can be nerve impingement and radicular pain. According to Dr. Wolgin, appellant experienced this type of fall on August 29, 2017 and that the increased spinal pressure resulted in L5-S1 disc protrusion and nerve impingement resulting in radicular symptoms. He explained that the mechanism of the fall also caused increased neck pain and aggravation of her preexisting cervical symptoms. Dr. Wolgin opined that the August 29, 2017 employment injury caused her chronic pain syndrome due to the persistent pain signals caused by the fall. He observed that her preexisting stenosis, disc protrusion, disc degeneration, and osteoarthritis made her less tolerant and flexible to the August 29, 2017 fall at work. Thus, Dr. Wolgin determined that the accepted August 29, 2017 fall at work resulted in an aggravation of her back pain and new bilateral shoulder, neck, and interscapular region pain. With regards to her work status, he found appellant had been totally disabled since her August 29, 2017 employment injury.

On December 13, 2018 appellant, through counsel, requested reconsideration of the September 20, 2018 decision denying appellant's claim for wage-loss compensation for December 23, 2017 and continuing.

OWCP received a disability note and report dated February 4, 2019 from Dr. Wolgin in which he reiterated his prior opinion that appellant remained disabled from work.

By decision dated March 12, 2019, OWCP denied modification.

On April 5, 2019 appellant, through counsel, requested reconsideration. In support of the reconsideration request appellant submitted medical reports of Drs. Wolgin and Tsymbalov previously of record.

By decision dated May 17, 2019, OWCP denied modification.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.<sup>8</sup> For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.<sup>9</sup> Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.<sup>10</sup>

Under FECA the term “disability” means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.<sup>11</sup>

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.<sup>12</sup> Rationalized medical evidence is medical evidence which includes a physician’s detailed medical opinion on the issue of whether there is a causal relationship between the claimant’s claimed disability and the accepted employment injury. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the claimed period of disability.<sup>13</sup>

### **ANALYSIS**

The Board finds that this case is not in posture for a decision.

Dr. Wolgin, in a November 26, 2018 report, reiterated appellant’s history of injury, noted her preexisting history of cervical and lumbar conditions and medical treatment, and presented examination findings. He diagnosed chronic bilateral low back pain with bilateral sciatica, lumbosacral radiculopathy, bilateral shoulder joint pain, anxiety, lumbar facet arthropathy, chronic

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<sup>8</sup> *B.O.*, Docket No. 19-0392 (issued July 12, 2019); *D.W.*, Docket No. 18-0644 (issued November 15, 2018).

<sup>9</sup> *Id.*

<sup>10</sup> 20 C.F.R. § 10.5(f); *B.O.*, *supra* note 7; *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

<sup>11</sup> *Id.*

<sup>12</sup> *J.M.*, Docket No. 19-0478 (issued August 9, 2019).

<sup>13</sup> *R.H.*, Docket No. 18-1382 (issued February 14, 2019).

pain syndrome, and chronic neck pain. Dr. Wolgin reiterated that appellant's conditions had been aggravated by her employment injury. He explained that appellant's fall at work exacerbated her lumbar radiculopathy and cervical and lumbar intervertebral disc disorder because where there was preexisting lumbar degeneration any pressure, such as a fall, on the spine worsened the lumbar condition. Dr. Wolgin explained that pressure on the lumbar spine from the fall increased the load on the discs and resulted in further disc protrusion and that if the protrusion was far enough, there can be nerve impingement and radicular pain. He concluded that appellant experienced this type of fall on August 29, 2017, which caused increased spinal pressure resulting in L5-S1 disc protrusion and nerve impingement resulting in radicular symptoms. Moreover, Dr. Wolgin concluded that the mechanism of the fall also caused increased neck pain and aggravation of her preexisting cervical symptoms. He explained that appellant's preexisting conditions made her less tolerant and flexible when she fell at work on August 29, 2017. Dr. Wolgin opined that appellant's nerve impingement, L5-S1 disc protrusion, and radicular symptoms were causally related to the August 29, 2017 employment injury. With regards to her work status, he found she had been totally disabled from any type of work since her August 29, 2017 employment injury.

The Board finds that while Dr. Wolgin's opinion regarding causal relationship lacks sufficient medical rationale to meet appellant's burden of proof to establish that her claim should be expanded to include nerve impingement, L5-S1 disc protrusion with radicular symptoms, and the resulting intermittent wage-loss compensation, it was based upon an accurate medical history and provided medical rationale explaining how the forces of impact in the accepted employment injury could result in or have aggravated the diagnosed conditions and resulting disability. As such, the opinion of Dr. Wolgin is sufficient to require OWCP to further develop the medical evidence in this claim.<sup>14</sup>

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.<sup>15</sup> While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and to see that justice is done.<sup>16</sup>

The Board will remand the case to OWCP for further development of the medical evidence to obtain a rationalized medical opinion as to whether the accepted employment injury of August 29, 2017 was sufficient to have caused or aggravated cervical and lumbar conditions and any resulting disability. OWCP should prepare a statement of accepted facts which includes the accepted conditions of the case as well as appellant's preexisting medical conditions and then obtain a second opinion examination on the issue of causal relationship. It should also determine whether appellant should be compensated for up to four hours per day for attendance at medical examinations. After such further development as may be deemed necessary, OWCP shall issue a *de novo* decision.

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<sup>14</sup> See *A.M.*, Docket No. 18-1098 (issued April 22, 2019); *R.H.*, Docket No. 17-1966 (issued March 6, 2018); *Donald R. Gervasi*, 57 ECAB 281 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>15</sup> See *A.M.*, Docket No. 18-0630 (issued December 10, 2018); *Vanessa Young*, 56 ECAB 575 (2004).

<sup>16</sup> *A.M.*, *id.*; *M.B.*, Docket No. 17-0536 (issued June 22, 2017); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

**CONCLUSION**

The Board finds that this case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 17, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 5, 2020  
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board